No. 78-980

In the Supreme Court of the United States

OCTOBER TERM, 1978

GRAND TRUNK WESTERN RAILROAD COMPANY,
PETITIONER

v.

DONALD R. BARRETT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

ROBERT E. KOPP
ALLAN GERSON
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-980

GRAND TRUNK WESTERN RAILROAD COMPANY,
PETITIONER

v.

DONALD R. BARRETT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 581 F.2d 132. The opinion of the district court (Pet. App. 15-18) is reported at 81 Lab. Cas. (CCH) ¶ 13,135.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13) was entered on July 17, 1978. A petition for

rehearing was denied on September 21, 1978 (Pet. App. 14). The petition for a writ of certiorari was filed on December 18, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Military Selective Service Act requires petitioner to grant respondent seniority as a fireman retroactive to the date respondent would have begun work as a fireman but for his military service.

STATEMENT

1. Petitioner employed respondent as a "C-2" locomotive fireman from 1963 to 1964, when respondent was discharged pursuant to a decision of Arbitration Board No. 282.[1] On April 26, 1965, petitioner hired respondent as a switchman, and petitioner worked in that position until he was inducted into military service on January 20, 1966 (Pet. App. 1-2). In May 1966, while respondent was on active duty, petitioner decided to hire more firemen, and it solicited applications from all eligible former "C-2" firemen except those in military service (Pet. App. 3-4).[2] If respondent had not been in the military, he would have been offered this opportunity to transfer to a fireman's job (Pet. App. 6).

[1] See Pub. L. No. 88-108, 77 Stat. 132; Pet. App. 2 n.1.

[2] Petitioner did not canvass unemployable or medically unqualified former firemen, or those who had received unsatisfactory ratings as firemen, but respondent was employable, medically fit and of proven competence (Pet. App. 3).

On January 12, 1968, respondent was honorably discharged from military service and sought reemployment from petitioner. He was rehired as a switchman with a seniority date of April 26, 1965 (Pet. App. 2). Respondent, however, maintained that he was entitled to transfer to a fireman's position under Section 9 of the Military Selective Service Act, recodified as 38 U.S.C. 2021, because he would have ~~88 U.S.C. (Supp. V) 2021, because he would have~~ been offered such a job in May 1966 but for his absence in military service. Petitioner denied respondent's request for a transfer, and respondent continued as a switchman until August 15, 1970, when he became a fireman pursuant to a routine vacancy in that craft (Pet. App. 4). Respondent was given no retroactive seniority as a fireman.

2. Respondent brought this action in the United States District Court for the Northern District of Illinois, seeking a judgment that he is entitled to a fireman's seniority date of July 29, 1967, the date he would have become a fireman under the May 1966 canvass. The district court concluded that the Act required petitioner to give respondent this seniority credit and granted partial summary judgment for respondent (Pet. App. 19).[3]

[3] The district court ordered the parties to stipulate the amount of back pay due respondent in light of the court's order, or to conduct further discovery on that question if necessary (Pet. App. 19). The court of appeals held that, notwithstanding the unresolved back pay question, the district court's order was appealable under 28 U.S.C. 1292(a). See Pet. App. 4-6.

The court of appeals affirmed. Noting that respondent would have been offered the fireman's position in May 1966 but for his military service (Pet. App. 6), the court reasoned that he was seeking "a change in status that would in fact necessarily have occurred if he had been continuously employed" (Pet. App. 8) and that petitioner therefore was required by the Act to provide it to him. See 38 U.S.C. 2021(b)(2). The court rejected petitioner's argument that because the decision to offer the new positions to former "C-2" firemen was discretionary, it was beyond the scope of the Act under *McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S. 265 (1958). "The Act's requirement is simply that there be a reasonable certainty that the veteran would have enjoyed the status he claims but for his service," the court of appeals stated. "That requirement is met here" (Pet. App. 9; citation omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court.

1. Petitioner does not dispute the court of appeals' determination (Pet. App. 6) that respondent would have been offered the opportunity to become a fireman in May 1966 but for the fact that he was in military service at that time. Rather, it asserts that "[t]he Act only protects a veteran's entitlement to rights arising out of his pre-service employment" and therefore "an employer may deprive a veteran of

the opportunity to transfer positions in his employment, an opportunity lost solely because of the veteran's engagement in military service, where the opportunity to transfer was not a perquisite of seniority in the veteran's pre-military service job" (Pet. 10-11).

This is an incorrect statement of the Act's protections. The Act provides that a veteran who "makes application for reemployment * * * after * * * training and service * * * shall * * * be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay * * *" (38 U.S.C. 2021(a)(B)(i)) and that he "shall be considered as having been on furlough or leave of absence * * * [and] shall be so restored or reemployed without loss of seniority * * *." 38 U.S.C. 2021(b)(1). Congress declared that the veteran "should be so restored or reemployed in such manner as to give [him] such status in his employment as he would have enjoyed if [he] had continued in such employment continuously * * *." 38 U.S.C. 2021(b)(2).

Thus the fact that "respondent, in his pre-service position as a switchman, had absolutely no right * * * to transfer to the fireman craft" (Pet. 11) is irrelevant. That right was granted, during respondent's absence, to all qualified former "C-2" firemen, and only because respondent was on active duty was he unable to take advantage of it. As the court of appeals recognized (Pet. App. 9), the situation is comparable to that in *Alabama Power Co.* v. *Davis*,

431 U.S. 581 (1977), which held that the returning veteran was entitled to count his time in the military as time on the job for purposes of computing his pension benefits. The employer adopted the pension plan while Davis was on active duty (*id.* at 590) and so, like respondent here, Davis "in his pre-service position * * * had absolutely no right" to a pension (Pet. 11). Davis was enrolled in the pension plan after he returned from military service, just as respondent was made a fireman after he returned.[4] Thus the fact that he could not transfer prior to his military service is of no consequence.[5]

For similar reasons, petitioner is incorrect in its claim that respondent is not entitled to retroactive seniority because the decision to hire former "C-2" firemen was an exercise of managerial discretion (Pet. 14-15). Petitioner seeks to bring its claim

[4] To be sure, respondent's transfer to the fireman's job came some two and a half years after he returned to employment. But his claim is the same as it would have been had petitioner made him a fireman immediately upon re-employment, namely, that his seniority in that position should be retroactive to the date he would have become a fireman but for his military service.

[5] Petitioner states that, as a result of the decision below, "[T]he Act * * * not only protects veterans from the erosion of identifiable pre-service rights of seniority, it also prevents the loss of opportunities resulting from military service" (Pet. 12). But this has always been the proper reading of the Act (see *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946)). The answer to petitioner's hypothetical question whether a returning veteran can "bump" another employee (Pet. 12) is Yes. *E.g. Conner* v. *Pennsylvania R.R.*, 177 F.2d 854, 856 (D.C. Cir. 1949). Cf. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 778 (1976).

within *McKinney* v. *Missouri-Kansas-Texas R.R.*, *supra*, which held that a returning veteran was not entitled to return to a position higher than the one he held when he left, if the promotion to that position depended not on mere seniority but on "fitness and ability and the exercise of a discriminating managerial choice." 357 U.S. at 272. But here the transfer to a fireman's position did not rest on a "discriminating managerial choice"; it was offered to every qualified former "C-2" fireman.[6] Had respondent been there, he would have received it. The fact that petitioner decided to lay on more firemen, or that it decided to offer the positions to former firemen, is not the kind of "managerial discretion" upon which the Act's protections turn.

2. Petitioner to the contrary (Pet. 13-14), the decision below does not conflict with the decisions of any other court. *Conner* v. *Pennsylvania R.R.*, 177 F.2d 854 (D.C. Cir. 1949), held that an employee returning from military service "should have been accorded the privilege of transfer which he would have had had he not been absent in the service." *Id.* at 858. In that case the privilege of transfer was bestowed by the collective bargaining agreement; in this case it was not. But nothing in *Conner* suggests that the result would have been different had the right of transfer existed (as it apparently did here) independent of the collective bargaining agreement.

[6] Consequently, petitioner's assertions that the transfer was "not afforded to all switchmen" and was "totally unrelated to the switchman's job" (Pet. 12) are beside the point.

In fact, the court refused to consider the provisions of the collective bargaining agreement because "*the Act* required that the appellee trainmen must have been offered any opportunity to transfer which they would have had had they not been absent in the service * * *." *Id.* at 858 (emphasis added). Far from conflicting with the decision below, *Conner* supports it.

In *Gregory* v. *Louisville & N. R.R.*, 92 F. Supp. 770 (W.D. Ky. 1950), aff'd, 191 F.2d 856 (6th Cir. 1951), the district court held that returning veterans who had been employed as laborers were not entitled to retroactive seniority after a cross-craft transfer to helpers, despite the fact that some laborers with less seniority had transferred while the veterans were away and thus were senior to the veterans. But the court found there that "[s]ome of such individuals possessed more laborer's seniority than did the plaintiffs, some less and some had no laborer's seniority at all" (*id.* at 772). Although the court did not focus on the question, it appears that the selection of laborers was a matter of managerial discretion, for it was not a function of seniority. In this light, the case is consistent with this Court's later decision in *McKinney*. In any event, *Gregory* is distinguishable from this case, where the petitioner conceded that respondent would have been offered a transfer had he remained at work.

In *Horton* v. *United States Steel Corp.*, 286 F.2d 710 (5th Cir. 1961), the court of appeals found that the transfer of an employee from one installation to

another was "dependent on fitness and ability and the exercise of a discriminating managerial choice" (*id.* at 713) within the meaning of *McKinney*, and thus that a returning veteran had no right to a transfer offered to some other employees while he had been in the military.

Finally, in *Hewitt* v. *System Federation No. 152*, 161 F.2d 545 (7th Cir. 1947), the court held that the returning veteran had no right to a promotion from car cleaner to carman helper simply because some cleaners had been so promoted in his absence. The collective bargaining agreement did not provide for such automatic promotions and there was conflicting evidence over whether such a practice existed independent of the collective bargaining agreement. Here, as we have explained, such a right concededly existed and was extended to former "C-2" firemen not in military service. Thus, even assuming *arguendo* that the collective bargaining agreement here did not bestow such a right, there is no conflict with *Hewitt*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

BARBARA ALLEN BABCOCK
Assistant Attorney General

ROBERT E. KOPP
ALLAN GERSON
Attorneys

FEBRUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 286000 301